United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

DOCKET NO. 75-7087

TO BE ARGUED BY
SAMUEL GURSKY

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SCHUYLER MARKET, INC., and
NATALE DE MARTINO,

Plaintiffs-Appellants,

v.

EARL BUTZ, as Secretary of Agriculture
of the United States,

Defendant-Appellee.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS,
SCHUYLER MARKET, INC., and NATALE DE MARTINO.

APPEAL FROM THE UNITED STATES DISTRICT
COURT OF THE SOUTHERN DISTRICT OF NEW YORK

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TABLE OF CASES

OTHER AUTHORITIES

REPLY TO APPELLEE'S POINT I

ON THE ISSUE OF A JURY TRIAL

The appellee contends that because the statute states that a trial de novo shall be held by the court, without mentioning the word jury, no jury was intended.

Vol. 5, Moore's Federal Practice, page 128.24 et seq. says that a jury trial may be had at the request of either party even in the absence of such a declaration in the statute.

Cases involving statutes which do not mention jury trial, but nevertheless have been held to be entitled to jury trial are:

Pure Food - 443 Cans of Egg Products v. United States 226 U.S. 172.

Sherman Act - Fleitman v. Welsbach 240 U.S. 27.

Housing Act - United States v. Friedland 94 F. S. 721.

Anti-Trust - Ring v. Spina 166 F 2nd 546 - other cases cited in the appellants' brief.

These cases involved equitable relief as well as money damages.

In Galloway v. United States, 319 U.S. 372, cited by the appellee, the court directed a verdict for the Government on insufficiency of evidence.

In United States v. Sherwood, 312 U.S. 584, cited by the appellee, the court dismissed the complaint in an action for damages for breach of contract with plaintiff's judgment debtor.

In neither case was the issue of a right to a jury trial involved.

REPLY TO APPELLEE'S POINT II

ON THE ISSUE OF BURDEN OF PROOF

Appellee relies on Redmond v. United States, 507 F2d 1007 for placing the burden of proof on the grocer. The facts in that case differ greatly from those in the case at bar. In Redmond, the grocer in the administrative proceedings submitted figures which showed that he made credit sales of $33,905.00, in violation of the food stamp regulations. At trial, this figure was reduced but it was nevertheless, even at the reduced figures, a violation of the food stamp regulations. The basic issue was "Did the grocer violate the statute and regulations." Whether the final figure found by the court was $7,000.00 or $33,000.00, did not change that result of admitting the violation.

In our case, there was an unequivocal denial of the charges both in the so-called administrative proceeding and at the trial in court.

The important and significant rule laid down by the Supreme Court in United States v. First City National Bank of Houston, 386 U.S. 361, is that the party (whether plaintiff or defendant) alleging the prime issue has the burden of proving it.

Obviously, the prime issue in this case is: Did Schuyler Market violate the Food Stamp Act and the regulations as alleged in the accusatory letter dated April 1, 1974?

The party asserting, pleading or relying on a fact or issue generally, has the burden of proof as to such fact or issue -

31A C.J.S. 104. The burden of proof exists only in connection with an issue offact.

William v. Administration of NASA, 463 F2d 1391.

The so-called hearing by Mr. Spear was actually no hearing in any sense of the word. He spent a few minutes in the office of the attorney for Schuyler by appointment at his convenience and asked Mr. De Martino what he had to say about the charges in the letter of April 1, 1974. Mr. De Martino denied that these transactions took place. Mr. Spear did not question him any further. He did not show him any of the reports of the aides or the agents of the department. He did not question him as to any of the details. No one else from the department showed up at this supposed hearing. No notes were taken by him or any one else.

Although the Food Stamp Act provides that the dealer is entitled to a de novo trial, it requires him to bring an action in court asking for it, thus making him the technical plaintiff in the action, although it is really the Department of Agriculture who has raised the prime issue of violations which are to be determined by the court de novo - and actually for the very first time after a hearing.

Under the circumstances of this action, it is respectfully submitted that the Government should have had the burden of proving by a fair preponderance of the credible evidence the violations it alleged.

REPLY TO APPELLEE'S POINT III

ON THE PREPONDERANCE OF THE EVIDENCE

The appellee fails to comment on Palmer v. Hoffman, 318 U.S. 109, and Yung Jin Teung v. Dulles, 229 F2d 244, and the cases cited therein.

It is understandable since Agent Schaffler testified that he was a special agent of Department of Agriculture assigned to investigate all violations or suspected violations of the food stamp program (S.M. p. 116 - l. 10-20).

The investigative aides - Cabassa and Olivera, were hired specifically for the purpose of trying to get ineligible items for food stamps (S.M. p. 34 - 1.8-14). They are paid by the agents in cash (S.M. p. 95 l. 14-21) and do not report their income from this employment to the Internal Revenue Service or the Welfare Department (S.M. p. 97, l. 1-12). Neither was required to undergo any investigation by any personnel agent of their qualifications for their jobs. (S.M. p. 128, l. 21; S.M. p. 92, l. 5 to p. 93, l. 10.)

Clearly the reports of the agents and their investigative aides were calculated for use essentially in court, not for any "shopbook" in the course of a business.

These reports were not exhibited, discussed or even referred to during the alleged so-called hearing of Mr. Spear, the Department's Review Officer. It was saved for the litigation which the Department apparently expected.

It is respectfully urged that it was error to admit these reports under the shopbook rule or otherwise under the cases cited in the appellant's main brief.

Agent Schaffler testified that neither he nor Ricks ever went into the appellant's store immediately after the visit to the store by their aides to check whether they were telling the truth and confronting the persons they alleged were violating the food stamp regulations (S.M. p. 130, l. 18-14). His "Worksheet" reports and those of Ricks therefore were really hearsay and a re-hash and repetition of what was allegedly told to them by their aides.

Pages 19 through 25 of the appellant's brief, set forth many contradictions, conflicts, and impossible physical situations so as to make the testimony of the Government witnesses unbelievable.

The conceded fact is that the agents did not enter the store within any short period of time after being advised by their aides of the alleged violations. No opportunity was given the store-keeper to immediately disprove or answer the alleged charges. The Department waited eleven months to notify Schuyler of the alleged violations. This is a burden that is unjust and impractical to meet after such a span of time. During this eleven month period there was no showing by the Department of Schuyler's violating its regulations.

CONCLUSION

The judgment dismissing the complaint should be reversed and judgment rendered for Schuyler and De Martino.

Respectfully submitted,

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Attorney for Appellants

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